

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

**UNITED STATES' MOTION IN LIMINE TO EXCLUDE
IMPROPER CHARACTER EVIDENCE**

I. Introduction

The United States hereby moves in limine for an order preventing the Defendants from introducing certain improper character evidence at trial. Specifically, the United States seeks and order that:

- prevents the Defendants from presenting extrinsic evidence of specific instances of conduct to impeach the character of witnesses for the United States;
- prevents the Defendants from attempting to introduce character evidence not related to truthfulness to impeach witnesses and from making statements or asking questions about alleged misconduct by witnesses without first proffering

- evidence showing a “good faith basis” that the misconduct occurred; and
- prevents the Defendants from introducing irrelevant evidence, making prejudicial statements, or asking prejudicial questions about the character of the victim in this case, BP America Production Company.

II. Argument

A. Extrinsic Character Evidence

At trial, the United States intends to call Kenneth Rains, a coconspirator of the Defendants, who is expected to testify that he conspired to rig bids with the Defendants. The United States has reason to believe that the Defendants may attempt to impeach Rains’s character for truthfulness by offering extrinsic evidence that he has attempted to bribe employees at other companies, specifically Patrick Kannard and Harley Temple. The United States has informed counsel for Defendant Smith that Rains denies these allegations, and counsel has indicated that if Rains denies the character allegations, the defense will attempt to impeach him by calling Kannard and Temple to testify about the alleged bribes. (Reply in Supp. of Def. Smith’s Mot. for Disc. (Docket # 70) at ¶ 10.)

Any testimony by Kannard and Temple is “extrinsic” character evidence and is inadmissible. Under Federal Rule of Evidence 608, specific instances of bad conduct by a witness may not be proven by “extrinsic evidence.” Fed. R. Evid. 608. Thus, even if the Defendants were entitled to cross examine Rains about his alleged attempted bribery (as explained later, they are not entitled to do so), they would be required to accept Rains’s answer and could not call Kannard or Temple to rebut it. *United States v. Olivo*, 80 F.3d 1466, 1470-71

(10th Cir. 1996) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”); *Wilson v. Muckala*, 303 F.3d 1207, 1216-17 (10th Cir. 2002); *United States v. Herzberg*, 558 F.2d 1219, 1223 (5th Cir. 1977) (“This language prohibits proof by extrinsic evidence even where the prosecutor “inquires into” prior acts on cross-examination.”); *United States v. Brooke*, 4 F.3d 1480, 1484 (9th Cir. 1993) (cross examiner is “stuck with” whatever answer witness gives when cross examining about specific instances of conduct to prove character). Therefore, the United States requests that the Court issue an order enjoining the Defendants from introducing this or other extrinsic evidence of specific bad acts to prove character.

B. Character Evidence Not Related to Truthfulness

The United States anticipates that the Defendants may attempt to cross examine Rains about alleged bad acts that do not relate to truthfulness, for the purpose of impeaching Rains' character. For example, the Defendants have indicated that they may attempt to cross examine Rains about bribery (as explained above) and alleged environmental crimes.

Under Federal Rule of Evidence 608(b), the Defendants may cross examine Rains about “[s]pecific instances of . . . conduct” only if the instances are “probative of truthfulness or untruthfulness” and only “in the discretion of the court.” Fed. R. Evid. 608(b). Obviously, alleged environmental crimes have nothing to do with truthfulness. Moreover, while bribery might sometimes also involve lying, in this case it is not at all clear how any of the allegations of bribery bear on Rains' character for telling the truth. *See United States v. Rosa*, 891 F.2d 1063,

1069 (3rd Cir. 1989) (“Bribery, however, is not the kind of conduct which bears on truthfulness or untruthfulness.”). Therefore, unless the Defendants proffer evidence showing that their allegations somehow involved untruthfulness, the Court should bar them from inquiring about any alleged bribes or environmental crimes in front of the jury.

C. Speculative Character Evidence Lacking a “Good Faith” Basis

The United States also has reason to believe that the Defendants may attempt to question prosecution witnesses about alleged wrongdoing which the United States believes is purely speculative and for which the Defendants have no “good faith basis” to inquire. For example, the Defendants have indicated that they may accuse Kenneth Rains of insurance fraud. However, the United States is not aware of any evidence that would be sufficient to give the Defendants a “good faith basis” to inquire about fraud. Therefore, the United States seeks an order preventing the Defendants from mentioning any wrongdoing by a witness without first proffering evidence at a sidebar sufficient to show a “good faith basis” that misconduct occurred.

Before the Defendants may attempt to impeach a witness by inquiring about specific instances of conduct, they must have a good faith basis to believe that they alleged conduct occurred. *United States v. Whitmore*, 359 F.3d 609, 622 (D.C. Cir. 2004) (“the general rule . . . is that the questioner must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the question relates”) (internal citation omitted). If the Court determines that the Defendants do not have a good faith basis that misconduct occurred, they may not ask any questions about the misconduct. Moreover, because the mere mention of misconduct can be prejudicial, some courts have held that attorneys should

warn the court and opposing counsel at sidebar before cross examining a witness about alleged misconduct. *See United States v. Schwab*, 886 F.2d 509, 513-14 (2d Cir. 1989) (necessary for attorneys to notify court in advance if they intend to question witness about misconduct under Rule 608(b)).

Accordingly, the United States seeks an order barring the Defendants from asking questions or making statements about any alleged misconduct not in evidence unless the Defendants first proffer evidence at a sidebar showing a “good faith basis” that misconduct occurred. This order will give the United States the opportunity to object to any questions before irreversible prejudice occurs and allow the Court to resolve any dispute outside the presence of the jury.

D. Irrelevant Evidence of the Victim’s Character

The United States has reason to believe that the Defendants may attempt to introduce evidence, make prejudicial statements, or ask prejudicial questions about the character of the victim in this case, BP America Production Company. Under the Federal Rules of Evidence, the defense may not introduce specific instances of misconduct by the victim, and it may not introduce any evidence of the character of the victim unless such evidence is “pertinent” to the case. Fed. R. Evid. 404(a)(2) (requiring evidence against victim to be “pertinent”); Fed. R. Evid. 405 (limiting evidence of specific conduct to cases in which character is “an essential element of a charge, claim, or defense”). Here, the character of the victim is wholly irrelevant to any legally-permissible defense and is therefore not “pertinent.” Accordingly, the Court should order the Defendants not to make any statements about the character of the victim without leave of the

Court, secured outside the presence of the jury.

IV. Conclusion

Accordingly, the United States requests the Court to order that:

- The Defendants may not offer the testimony of Patrick Kannard and Harley Temple or otherwise attempt to present extrinsic evidence of specific conduct to impeach a witness.
- The Defendants may not attempt to impeach witnesses by asking about environmental crimes, bribery, or other acts that do not relate to truthfulness.
- The Defendants may not impeach witnesses by asking about specific instances of conduct without first proffering at sidebar a “good faith basis” for believing the conduct occurred.
- The Defendants may not mention the character of the victim in this case without first obtaining leave of the Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2007, I electronically filed the foregoing United States' Motion in Limine to Exclude Improper Character Evidence with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

s/Diane Lotko-Baker

DIANE C. LOTKO-BAKER

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